UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PAUL BARNEY HALLINGBY,

Plaintiff,

v. 09 CV 2223 (MGC)

ROUSH PUBLICATIONS, INC., et al.,

Defendants.

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New York, N.Y.
September 28, 2011
10:00 a.m.

Before:

HON. MIRIAM GOLDMAN CEDARBAUM,

District Judge

APPEARANCES

BROWNSTEIN HYATT FARBER SHRECK
Attorneys for Plaintiff
BY: DEBORAH DROOZ
LAWRENCE W. TREECE

ARKIN KAPLAN RICE LLP
Attorneys for Defendants
BY: JOSEPH A. MATTEO

(Case called)

MR. TREECE: May I proceed.

THE COURT: Yes.

MR. TREECE: I'd like to put on the record that I have been admitted pro hac vice so I am officially permitted to talk.

I will tell you briefly why we want to depose Mr. Calico and why we think we should be able to. I would say as a procedural matter we don't want to make anything out of motion to compel was filed or no motion to quash was filed.

THE COURT: I understand. You want the issue to be heard.

MR. TREECE: We want the issue to be heard and resolved, and one of the things I'm going to ask the Court to help us with here is to just get some rulings on some things that are outstanding and we think you should rule in our way, but a ruling is important to move things along. Mr. Calico is in New York. It's a straight third-party subpoena. He was served. They objected, and he did not appear at his deposition because they took the position in the letter to your Honor --

THE COURT: That he has no knowledge.

MR. TREECE: He does have knowledge. Their position is he doesn't know anything.

THE COURT: Those are inconsistent positions. You say he has knowledge and they say he has no knowledge.

MR. TREECE: And I think the important thing is that under the law if they want to say he doesn't have to appear for deposition, they have to prove, and I think the quote is, he has nothing whatsoever to contribute, we think he does. He is a person who is very connected with Mr. Massini, who is the individual in Switzerland involved with the letters rogatory issue.

THE COURT: I don't understand. When you say connected with, what does that mean? What is his relationship to any of the facts in this case?

MR. TREECE: We believe he has had with Mr. Massini and with the, at least one or maybe more of the defendants in this case, conversations about this car. He and Mr. Massini are both prominent in the Ferrari community.

THE COURT: Wait just a minute. Haven't you deposed Mr. Massini?

MR. TREECE: No. He's the one who is subject to the letters rogatory proceeding.

THE COURT: I've issued letters rogatory.

MR. TREECE: And nothing's happened, which is the other issue. The proceedings for both Mr. Weber and Mr. Massini were scheduled. Both cancelled. Neither reset. Both involving, Mr. Weber said he had to get some kind of release of attorney-client privilege before he could testify at all. That hasn't happened.

THE COURT: Is he an attorney?

MR. TREECE: He's a Swiss attorney.

THE COURT: You can understand that.

MR. TREECE: I can understand that.

THE COURT: Why are you deposing a lawyer anyhow?

MR. TREECE: It's really their letters rogatory, not ours. We don't care whether this goes forward or not.

THE COURT: You're seeking to depose a lawyer?

MR. MATTEO: Your Honor, Mr. Weber is an attorney in Switzerland, the person who placed the advertisement in my client's magazines that gave rise to this lawsuit.

THE COURT: Whom was he representing when he did that?

MR. MATTEO: He was representing the owner, the original owner, Dr. Andreas Gerber.

THE COURT: So why aren't you deposing the client, not the lawyer?

MR. MATTEO: Because the only person with whom our clients had contact was Mr. Weber. They've never spoken to Dr. Gerber.

THE COURT: What has that got to do with it?

MR. MATTEO: One of the issues in the case, your Honor, was what information was given to our clients with respect to the advertisement. The advertisement was the stolen Ferrari, and the conversations they had.

THE COURT: What information was given by whom?

MR. MATTEO: By Mr. Weber.

THE COURT: You're saying Mr. Weber is the person who actually placed the advertisement?

MR. MATTEO: Yes.

THE COURT: And your client had a conversation with him?

MR. MATTEO: Limited conversations.

THE COURT: And plaintiff had a conversation with him?

MR. MATTEO: Our clients had limited conversations for the purpose of placing the advertisement.

MR. TREECE: We've had none.

THE COURT: Then your clients can testify to what the conversation was, isn't that right?

MR. MATTEO: Your Honor, they certainly can, and these are third parties and we don't need them to move forward with summary judgment. We may want to use their testimony at trial. We've been prevented from deposing them in the United States because plaintiff has threatened legal action, has actually brought legal action in Switzerland against Mr. Weber's client, so they're scared to come to the U.S. They're third parties and may have something to contribute in terms of the trial.

THE COURT: Let me understand. You have two parties here in Switzerland.

MR. MATTEO: Yes.

THE COURT: One is someone with personal knowledge of the facts and someone else who is his lawyer.

MR. MATTEO: There's a third party, Mr. Massini, your Honor.

THE COURT: Yes. And what is his connection?

MR. MATTEO: He is an expert in antique Ferraris. The car at issue in this case was an antique Ferrari, and both of my clients checked with Mr. Massini regarding the status of this particular car before publishing the advertisement.

THE COURT: What do you mean by the status?

MR. MATTEO: Whether or not it was stolen.

THE COURT: How does he know?

MR. MATTEO: He's an expert in these cars.

THE COURT: That's not an issue of expertise. That's a fact.

MR. MATTEO: Exactly, your Honor, and the fact that our client --

THE COURT: You can't have expert testimony on a fact.

MR. MATTEO: We're not asking for expert testimony from Mr. Massini, your Honor. It's merely the fact that our clients spoke to Mr. Massini. While that's not in dispute, one of my clients can testify to that fact. Unfortunately, the other client passed away during the pendency of this case.

THE COURT: What is the relevance of whether he talked to this man or not?

MR. MATTEO: Your Honor, it goes to whether or not my clients conducted proper due diligence and whether or not they were grossly negligent or acted with actual malice.

THE COURT: Is anybody doubting that he talked to whoever this man is?

MR. MATTEO: There's no doubt that they spoke.

THE COURT: Is anybody denying that?

MR. MATTEO: Your Honor, nobody is denying that they spoke. There are certain e-mails that we would like Mr. Massini to authenticate, they're already in the record, and given that one of our clients has passed away --

THE COURT: What has that got to do with Weber? I'm trying to take them one at a time.

MR. MATTEO: Moving back to Weber, he is the person in this case who placed the advertisement. Our client spoke to Mr. Weber who is an attorney in Switzerland.

THE COURT: I see. So there you have direct contact.

MR. MATTEO: Yes.

THE COURT: And you want to elicit what he said and what they said.

MR. MATTEO: Yes, your Honor, and the same is true with Mr. Massini.

THE COURT: By whom and in what context?

MR. MATTEO: By both of our clients, your Honor, Mr. Barnes, who publishes Cavallino magazine. Directly after he received the proposed advertisement, he contacted Mr.

Massini who is known as an expert in the field and asked him is this car stolen and he was told, yes, it is. And on the basis of Mr. Massini's representation and that due diligence, he published the advertisement. Mr. Roush also had conversations with Mr. Massini -- Mr. Roush has now passed away -- in which they discussed the car.

THE COURT: How are you going to show that, the conversations with the dead man?

MR. MATTEO: We have documentary evidence, your Honor, in the form of Mr. Roush's business records.

THE COURT: Then you do not need anybody who talked to the dead man?

MR. MATTEO: No, your Honor, with the exception of one or two e-mails that we'd like to authenticate through Mr. Massini --

THE COURT: Whom are these e-mails between?

MR. MATTEO: I believe, your Honor, they're between Mr. Massini and Mr. Roush.

THE COURT: I see. All right. As to that, you want his testimony that those are e-mails that he sent and that he received and answered?

MR. MATTEO: Yes. Yes, your Honor.

THE COURT: Now, what is preventing that?

MR. MATTEO: My understanding, your Honor, if I may, Mr. Weber, there's currently a criminal case in Switzerland that plaintiff has brought against Dr. Gerber, Mr. Weber's client. He has some concerns about the attorney-client privilege. The judge in that case, in that proceeding in Switzerland, my understanding, is going to contact this Court with a question.

THE COURT: Under American law, as you know, if a lawyer says something to a third party, that's not an issue of attorney-client privilege, if he's talking about his own knowledge.

MR. MATTEO: Your Honor, I understand. And I don't understand what the parameters of the attorney-client privilege are in Switzerland.

THE COURT: Switzerland is not a place that believes in heavy release of information, let me put it that way.

MR. MATTEO: My understanding as well, your Honor.

But in terms of what is happening, Mr. Weber, the judge in his proceeding, postponed the proceeding temporarily, and these are compulsory proceedings.

THE COURT: But he will make a ruling.

MR. MATTEO: He will make a ruling or contact this Court.

THE COURT: So at some point you either will be able to question Mr. Weber or not?

MR. MATTEO: Yes, your Honor.

THE COURT: In accordance with the determination of a

Swiss court.

MR. MATTEO: That's my understanding, your Honor, yes.

In terms of Mr. Massini, his proceedings were postponed because he would be away on a business trip on the date on which his deposition was scheduled.

THE COURT: Wasn't a substitute date set?

MR. MATTEO: Your Honor, based on the document we received from the Swiss court, it was in German, my understanding is no, there is no date at this point, but these are compulsory proceedings. Both are going to go forward. They're required to go forward. There's no reason to think that they won't go forward. And, in any event, they're necessary only for trial, as your Honor pointed out in May, these are de bene esse admissions.

THE COURT: I would like to set a trial date. This case has gone on for a long, long time.

MR. MATTEO: Agreed, your Honor.

MR. TREECE: So would we.

MR. MATTEO: We would like to move it forward and move for summary judgment and ask your Honor to set a briefing schedule for that.

THE COURT: I don't set a briefing schedule for summary judgment. What I do is hold a conference, which I will hold this morning. It's the only premotion conference I hold, just to be sure that it's not premature. I never prohibit any motion that the federal rules permit.

MR. MATTEO: Yes, your Honor.

THE COURT: But sometimes the response to a motion for summary judgment is I haven't yet completed discovery. So it's a waste of time until discovery is completed.

MR. MATTEO: Yes, your Honor.

THE COURT: That's what I mean by premature.

MR. TREECE: Your Honor, could I clarify the situation?

MR. MATTEO: If I may.

THE COURT: I will give you an opportunity to be heard. I can only hear one at a time.

MR. TREECE: I understand.

THE COURT: You may be seated, and I will call on you as soon as he finishes his explanation.

MR. MATTEO: Your Honor, our position is that the only way to guarantee these proceedings will move forward in this case is for your Honor to cut them short at this point. There's no harm for any party to have these proceedings proceed in Switzerland. The testimony will be taken in due course, I can't tell you the date on which they'll be taken, your Honor, because I don't understand the Swiss procedure correctly, but they are compulsory proceedings. These witnesses are required to testify.

We were before your Honor in May. Your Honor authorized us to go forward with this process, and we see no reason, and plaintiff has given us none, why it should be cut short at this point.

THE COURT: All right. Now what is it that you want me to know?

MR. TREECE: Let me clarify the situation in Switzerland and then tell you the problem we're having with the way this is proceeding.

First of all, there's no criminal proceedings proceeding in Switzerland. There is a charge that's been filed, and it's being, as they do in many of the civil law countries, a prosecutor is engaged in investigating it. That's it.

THE COURT: But this is not an investigative magistrate who is also the judge, is it?

MR. TREECE: You know, I'm not sure how Switzerland works.

THE COURT: At the initial level in a criminal matter, the judge is really the prosecutor.

MR. TREECE: It is a kind of judge/prosecutor investigation like I understand they do in Switzerland, but I'm no expert on that, and it sounds like you know more than I.

THE COURT: It's true in many civil law countries and it's true in England, which is not a civil law country.

MR. TREECE: That's the state of the proceeding there.

With regard to Mr. Massini coming to New York, we have often told the Court and will again regardless of what may be going on, we would not serve Mr. Massini with any process if he came to New York for a deposition. The problem this is presenting to the case is that it's the tail, I'd like to say wagging the dog, but wagging the dog entails movement, and what it's actually doing is, I guess if you sail it's the sail put down in the water as a drag anchor. Mr. Massini, too, in his letter to the Court, has asserted a kind of privilege. He says that his relationship with Dr. Gerber is such that for some reason under Swiss law gives rise to a confidentiality privilege. Our Swiss lawyers tell us --

THE COURT: A confidentiality about what?

MR. TREECE: Who knows? It's Swiss law. If we put it in American law terms, like there's some kind of fiduciary law going on that gives rise to some confidentiality. But who knows? But our Swiss lawyers tell us it's a claim of confidentiality that the judge in Switzerland is likely to honor, is likely to honor without there being any written agreement of any kind at all, and so he cancelled for two reasons. One, he was on a business trip. Two, he's got to figure out this confidentiality issue. That has not been reset.

THE COURT: How can it be confidential if he's the one who placed the ad?

MR. TREECE: He didn't place the ad. Mr. Weber placed the ad. We're talking about Mr. Massini.

THE COURT: They are both lawyers?

MR. TREECE: No. Mr. Massini is not.

THE COURT: Then what is the confidentiality claim for him?

MR. TREECE: Your Honor, it beats me. I have no idea. It's Swiss law. In the United States, it would be a claim of confidentiality that would not be honored, but the Swiss lawyers tell me over there it is and it might be, and it might be by this judge.

THE COURT: But what is the confidence he's claiming?

MR. TREECE: All he said was in his letter, I wish I could tell you more, his letter just said there are confidentiality issues between him and Dr. Gerber about what he may be questioned about. Because of that, he actually --

THE COURT: He can't be questioned about anything that isn't authorized. So what is it that he doesn't want to have to be questioned about?

MR. TREECE: It looks like anything. In addition to that, he's asked the judge in Switzerland to give him copies of all the questions that have been submitted before they get asked him under the letters rogatory proceeding so that he can assess this confidentiality claim.

THE COURT: Why hasn't that gone forward?

MR. TREECE: Who knows? One judge in one province has the Weber proceeding. A different judge in a different canton, I guess, has the other proceeding, and so, we don't know. So the fact, with both those depositions, particularly with Massini's, is it's been vacated. It hasn't been reset. There's a claim of confidentiality. We're told by our Swiss lawyers it likely will be honored, which means there's a lot of information he won't give. He's trying to get a preview of the questions that are asked before he's asked, which the deponents in the United States would love but which doesn't happen, and so we don't know when. The scheduling is up to the judge in Switzerland. We don't know when it's going to get rescheduled, whether he's going to claim confidentiality as to everything, whether he's going to produce anything useful.

Similar situation with Weber. He's got the attorney-client issue, and the Court will remember that the Court in essence said with regard to these, let's give this a try and see if it works and if it doesn't, come back.

That's why we're here.

THE COURT: You're coming back.

MR. TREECE: Interestingly, Massini, in cancelling his procedure in Switzerland, submitted an itinerary that shows he was actually in New York not long ago for three or four weeks; he comes here all the time. And so what we're saying is this isn't working. It's dragging the case down. They're going to want to use declarations from these guys in support of the motion for summary judgment. Who knows whether this will have happened before then. We're going to say no fair, can't do it. I'm saying it to you right now. That's no fair, put an end to this, and say what we think is fair and right, which is, look, this isn't working. If you guys have enough influence over these folks to get declarations from them, if you've got enough influence over these folks to maybe have them come testify live at trial, you've got enough influence to get them to come here for a deposition. We don't care whether that happens at all. If they're not going to show up live at trial and we're not going to be looking at some product in this weird Swiss proceeding at trial, we don't care whether the depositions go forward. But if they're going to show up live at trial, we want a good, old-fashioned American deposition, question and answer, no pre-submission of questions, no weird privilege claims, so that we can cross-examine them. So we think the time has come to move this case along, to put this proceeding to rest, and to say what I just suggested.

MR. MATTEO: Your Honor, I would dispute a few points. One, this issue isn't dragging this case along. This process can go forward as it goes. These are de bene esse depositions, they may be used at trial. Nothing else is being held up as a result of this process, which your Honor has already authorized.

THE COURT: What's being said is trial has been held up.

MR. MATTEO: Trial hasn't been held up, your Honor. We've been engaged in the rest of discovery.

THE COURT: That's what I need to know first. Exactly what is the status of discovery?

MR. MATTEO: From our end, your Honor, discovery is complete and we're prepared to move forward to summary judgment.

THE COURT: If you're ready for summary judgment, you should be ready for trial.

MR. MATTEO: Yes, your Honor.

THE COURT: Because essentially summary judgment is a claim that at the end of the plaintiff's case the Court will direct a verdict. Isn't that right?

MR. MATTEO: Your Honor, I understand. But the purpose of these depositions would be as testimony at trial.

THE COURT: I understand.

MR. MATTEO: There's no need at this point to hold up any other procedure or process in this case as a result of these depositions. So the claim that this is holding things up I just don't see.

THE COURT: All right.

MR. MATTEO: There's one more point, your Honor.

THE COURT: What's being said is if I schedule the trial and these depositions have not been taken, you're not going to be able to use them de bene esse.

MR. MATTEO: Of course, your Honor, and that's been a risk along.

THE COURT: Since they're your people, you're not concerned about whether you can get them to testify at trial or get their de bene esse depositions.

MR. MATTEO: They're not our people. They're third parties. We don't control them. We've tried.

THE COURT: That's not the point.

MR. MATTEO: Yes, your Honor.

THE COURT: Do I understand you have no problem with my setting a trial date and if you're able to get them, that's fine and if not, not?

MR. MATTEO: That's our position.

THE COURT: They're not pressing it.

MR. TREECE: But our position is, and we think a ruling now would help, that they can't bring them live at trial unless they get them here for a good, old, American deposition first.

THE COURT: So look at it another way. If they can get them to come for trial, they'll have to come sufficiently in advance of trial to be deposed.

MR. TREECE: We would love an order like that, your Honor, so that they either can't testify live at trial, or, if they are, they have to be made available in America, in New York, two or three weeks.

THE COURT: Why do you care where? Why do you care whether it's in Switzerland or New York?

MR. TREECE: Actually, we don't. They don't let you depose them. But England, Germany, Lichtenstein, anywhere where they permit real depositions, that's fine. London, my experience, a lot of people, to avoid this and have a real deposition, go to London and have a real deposition, so just so it's a real deposition where you can ask questions, you can follow up, you can cross-examine, that ought to happen two or three weeks or four weeks before trial if they're going to testify live, and if not, they can't testify live. And these proceedings in Switzerland, I don't know Latin, bene esse depositions, same as. They're just not because the Swiss procedure is so weird with written questions and maybe you can follow up and maybe you can't. Our Swiss lawyers tell us that all depends on the judge; the judges vary.

THE COURT: These are held before judges?

MR. MATTEO: Yes, your Honor.

THE COURT: I see. That is unusual. In most countries, they're held before some official, but it's not usually a judge.

MR. MATTEO: If I may, plaintiff is prejudging what will happen at these proceedings in Switzerland.

THE COURT: I understand. Just a moment. As I understand it, the defendant has conceded that if he can't get depositions, if you can't get depositions of these parties, he will not present them at trial.

MR. MATTEO: Yes, your Honor.

THE COURT: That's a simple, clear statement.

MR. TREECE: So long as it's clear this is real depositions, not these Swiss proceedings in which the magistrate administers the questions, reads the questions, we may or may not be allowed to ask any questions at all. No written transcript comes out of it. Summary notes from the magistrate come out of it.

THE COURT: I'm not familiar with that. When I was practicing law, I deposed people all over Europe. I have never had that experience.

MS. DROOZ: We have Swiss counsel.

THE COURT: Switzerland is unique in many ways.

MR. TREECE: Our Swiss counsel explains to us that's the way it is. And that's my understanding of the way it is. It's not a commission, and you just had better luck than we do. And so if the defendant is saying we won't call them live unless we can depose them two or three or four weeks before trial in a real deposition, I mean questions by the lawyers, cross-examination, follow-up, none of this read-the-question stuff, wherever we can do that, London, we don't care, if that's what they're saying, that's fine.

THE COURT: Has there been any effort to get them to come to another country?

MR. MATTEO: There has been, your Honor. We tried to get them to come to United States, to London, to any other country.

THE COURT: Why won't they come?

MR. MATTEO: Frankly, they are scared to death of the plaintiff. He has threatened them before and they have no faith they will be protected.

THE COURT: If the plaintiff tries to serve them with process when they come to this country, I will quash the process.

MR. MATTEO: Your Honor, we've explained that to them. They're not our clients, we don't control them, and they refuse to take our word for it. I don't know what else to say. We have really tried many times.

THE COURT: You can't sue them in London?

MR. MATTEO: We've tried every possible avenue with these individuals.

THE COURT: Then you're out of luck.

MR. MATTEO: We are. This is why we were here in May. This is why your Honor ordered us to proceed with the Hague Convention process.

THE COURT: Yes.

MR. MATTEO: A couple of points on that, your Honor. One, we've heard a lot about what plaintiff's Swiss counsel's understanding of the law is, but I don't know that that's true or not.

THE COURT: Do you have Swiss counsel?

MR. MATTEO: We do not have Swiss counsel, your Honor.

THE COURT: Why not? Why haven't you inquired of a Swiss lawyer?

MR. MATTEO: We've gone through the normal Hague Convention process. We've consulted with the State Department, consulted with the consular officers.

THE COURT: I know. But have you consulted with anybody in Switzerland?

MR. MATTEO: Other than the consular officers and people at the --

THE COURT: What have the consular officers told you?

MR. MATTEO: About?

THE COURT: About taking a deposition in Switzerland.

MR. MATTEO: They've given us the procedures to do it. We haven't asked them specifically how each judge will have handled it. We haven't talked to the judges on our own.

THE COURT: Why should it get to a judge?

MR. MATTEO: My understanding, in Switzerland, of the way the process works is a judge presides over each of these proceedings. The parties submit questions. We submitted those questions to your Honor, and your Honor approved them. They were then sent to Switzerland, the judge then asks the questions or follow-up questions if he or she so chooses.

THE COURT: Is there any reason why they can't go to some other country in Europe if they're afraid of coming here?

MR. MATTEO: I don't see one, your Honor, but these two witnesses see it differently.

THE COURT: You may be out of luck in using them.

MR. MATTEO: Your Honor, if I may, to be clear, your Honor authorized us to proceed under the Hague Convention. There's been no showing that the Hague Convention is somehow inadequate process by any stretch of the imagination. I think that's actually a pretty drastic point.

THE COURT: Have you proceeded under the Hague Convention?

MR. MATTEO: We have, your Honor. We submitted questions to your Honor. The plaintiff submitted questions to your Honor. Your Honor approved them. We transmitted them to Switzerland, and they're now in front of the two presiding judges in the various cantons, the two cantons where these witnesses live. Those proceedings are going to go forward.

THE COURT: When?

MR. MATTEO: The issue is they were scheduled and both were postponed, one for this issue as to the attorney-client privilege. My understanding is that the judge in that case was going to contact this Court. In the other case, Mr. Massini had a business trip, and he was going to be out of the country at the time.

THE COURT: Where was he going to be? That's the place where you should depose him.

MR. MATTEO: Your Honor, I don't know. I think at some point he was going to be in Italy.

THE COURT: Why don't you depose him in Italy if he has business in Italy?

MR. MATTEO: We don't know where he'll be. He told us after the fact where he would be.

THE COURT: You're telling me these are not willing witnesses.

MR. MATTEO: They're not willing, and that's why your Honor authorized us to go forward with the Hague Convention proceeding, and they're compulsory proceedings.

THE COURT: I understand, within limits. They can't go on forever.

MR. MATTEO: I agree, your Honor, but I don't see the harm. This process will go forward. If it goes forward in due course before trial, testimony will be available, and whatever happens, plaintiff is prejudging whether or not that will be adequate process. Why don't we wait and see what happens in Switzerland first and at that point we'll see what happens.

THE COURT: What's being asked is that the trial not be postponed for that. Is this the only additional evidence required in the case?

MR. MATTEO: From our end, your Honor, yes.

THE COURT: How about the plaintiff? Have you completed discovery? And if not, why not?

MS. DROOZ: We have completed discovery except on one issue, your Honor.

THE COURT: What do you mean except? Why is it except?

MS. DROOZ: The issue of punitive damages, ordinarily my understanding --

THE COURT: That's a legal issue. That's not a factual issue.

MS. DROOZ: The measure is contingent on the net worth of the defendant.

THE COURT: If we reach that point.

MS. DROOZ: Very good. As long as the Court understands we don't have evidence of net worth on that, if the defendant moves for summary judgment on the issue of damages, we have not conducted discovery because it wasn't timely to do that yet. So that's the only issue that we have remaining.

THE COURT: Very rarely do I try punitive damages in the same proceeding anyhow.

MR. TREECE: You bifurcate, your Honor?

THE COURT: Bifurcate is not exactly the way I do it.

But if the jury returns a verdict against the defendant, I will then keep them and ask them whether the conduct that they have heard, after I instruct them on what the law is on punitive damages, whether they think that the plaintiff's conduct was so outrageous that they should consider punitive damages.

MR. TREECE: But if they then at that point say yes, how does the plaintiff get discovery?

THE COURT: Because if there's more evidence on the question, I will permit it. If the jury decides that. The net worth of the party against whom punitive damages are being assessed is entirely separate from whether their conduct is worthy of punitive damages.

MR. TREECE: Understood.

THE COURT: That's to measure damages, not to determine whether there should be damages.

MR. TREECE: Understood.

THE COURT: If the jury decides that there should be punitive damages, then the net worth of the parties becomes relevant. Up to that point, it's irrelevant.

MR. TREECE: My question just is a logistical one.

THE COURT: I do this right after the trial, if there's a verdict.

MR. TREECE: My question, jury's still there, you don't let the jury go?

THE COURT: No. I tell them to come back the next week, or whatever it is. But I ask them this question in order to decide whether to have them come back.

MR. TREECE: Right. Understood.

Then are we permitted discovery in that interim while the jury's out on defendant's financial condition?

THE COURT: You mean to tell me you don't know their net worth at this point?

MR. TREECE: No, we don't.

THE COURT: You can't use it for any purpose at the trial, but you can get the answer to the question.

MR. TREECE: That answers the question because they've taken the position that we don't get it until we've reached the point your Honor described.

THE COURT: We don't stop for discovery.

MR. MATTEO: Your Honor, if I may, a couple of points.

One, plaintiff has never actually asked for that information in a document request or any formal discovery. They raised it at one point when we asked them for discovery as to their punitive damages theory. They refused on ground that this is an issue as to which discovery is not had until after a trial.

THE COURT: Their theory is certainly not a separate discoverable issue.

MR. MATTEO: Your Honor, there is case law, and we'd be happy to submit a letter to the Court on this point, that parties not supposed to take discovery as to defendant's net worth.

THE COURT: There may be case law, but it doesn't make sense to me.

MR. MATTEO: Your Honor, if we don't determine that there's any issue as to whether or not there are punitive damages, and there is going to be one apparently, net worth information is very sensitive.

THE COURT: That's a different matter. They can't use the information until that's determined.

MR. MATTEO: Your Honor, net worth information is a very sensitive, private information.

THE COURT: I understand.

MR. MATTEO: It's a very limited set of discovery if the Court determines or if the jury determines it.

THE COURT: I have never held discovery after a jury verdict, but I suppose it's conceivable if it's provided a day or two later.

MR. MATTEO: Your Honor, that's what we would do. And if your Honor feels otherwise, I would like an opportunity to submit a letter to the Court setting authority for the proposition that that's how we should proceed.

THE COURT: That's not an issue of black letter law. That's truly an issue of management of a trial, and the federal rules were designed in their origin, although they've become much more detailed, unfortunately, to encourage trial judges to use good sense in managing cases because cases differ.

MR. MATTEO: Your Honor, of course, and given the sensitivity of this information, the limited nature of the information, if we get to the point where the jury is going to consider a punitive damages claim, I would submit that that is the point where we turn over information to the plaintiff. Before that I don't see the need.

THE COURT: The plaintiff's lawyers can be under an order directing that it's for lawyer's eyes only and they may not share it even with their clients. We have many such protective orders.

MR. MATTEO: Your Honor, that is one way to do it for certain. But all the same, this is a very small amount of discovery. We could hand it over after trial if the need arises, but if it doesn't arise we'd all the same wait until then.

MR. TREECE: Your Honor, could I suggest one of two things, either of which meets the way your Honor does it, which I respect, and meets our needs? We're happy to agree to a protective order just like you described. By the way, we're also happy to agree to an order from this Court right now that if Mr. Massini comes here for a deposition, we will not serve him and we will be held in contempt if we even try, and if we try, not only will we be put in jail, but you'll quash the service, so a protective order like you've described on the financial information is fine, but the Court correctly recognizes discovery of that information and use is different, and it clearly shouldn't get before the jury until the judge has made a determination of whether there is a case that can go to the jury on punitive damages. But then there's this little tiny window for discovery. So discovery now, we would propound right away, punitive damage discovery, if you would permit us.

THE COURT: Depends what it is.

MR. TREECE: I guarantee it will be limited.

THE COURT: Standard.

MR. TREECE: Permissible, and then they can respond and we can get that going and work it out. Or if the Court is concerned about prematurity, we could put that discovery off until summary judgment motions have been briefed and ruled on and, as part of that process, ask for a specific determination by the Court as part of the rulings on summary judgment, that if as we think there will, our case gets past summary judgment and proceeds, that there is enough likelihood of a case that would go to the jury on liability.

THE COURT: That I can't. That I can't. I can't tell. I don't know what your evidence is.

MR. MATTEO: Your Honor, may I propose an alternative.

THE COURT: What is that?

MR. MATTEO: If plaintiff wants to propound his punitive damages discovery request at this point, he do so. We will consider them. We will meet and confer, come to agreement on the appropriate scope, collect all the documents, and if the issue of punitive damages becomes an issue after trial, we'll then turn those documents over forthwith so at that point we waste no time whatsoever. We also protect the privacy rights of our client.

MR. TREECE: That just doesn't give us enough time, your Honor. I think discovery pretrial with a protective order so we've got the information is the fair thing to do. We'll obviously respect whatever the Court orders.

THE COURT: If they lose at trial, they'll have to destroy whatever it is.

MR. TREECE: Absolutely.

MR. MATTEO: Your Honor, I don't see, if the issue, as plaintiff's counsel said, is going to be limited discovery, at the end of the day the only figure that's important is the bottom-line net worth of my clients.

THE COURT: That's true.

MR. MATTEO: I don't see the need for this broad, long-reaching discovery.

THE COURT: That's true.

MR. MATTEO: We'll turn it over the day after. They'll have the number. They can argue to the jury.

THE COURT: They want to know how you calculate it.

MR. MATTEO: We will show them that, your Honor. This is the point. We'll meet and confer.

THE COURT: Why don't you do that and keep it for lawyers eyes only. It can even be for the eyes of only one lawyer, and clearly the clients will not see it and the lawyer is required not to show it to anybody, and we'll see what the verdict shows.

MR. TREECE: That's fair, your Honor.

MR. MATTEO: Very well, your Honor.

THE COURT: That sounds sensible to me.

I take it apart from summary judgment you are on the eve of trial.

MR. MATTEO: Yes, your Honor.

MR. TREECE: Your Honor, we do have one. You asked about discovery. That aside, that's taken care of. Thank you. There is expert discovery to complete. We've got four.

THE COURT: What kind of experts here? I don't understand. You don't have experts on the law. There's only one expert on the law in the courtroom. And that's the judge.

MR. TREECE: Understood, your Honor. With definitive ruling.

We have an expert to testify about the title issue to the car itself.

THE COURT: I don't know what that means.

MR. TREECE: Provenance of these cars. These foreign cars, particularly old ones, particularly Ferraris, they often have no title documents like we're used to here. There is a procedure.

THE COURT: Are there title documents here?

MR. TREECE: Not like you get from the Department of Motor Vehicle.

THE COURT: Forgetting what they're like, are there title documents?

MR. TREECE: There are documents that are indicative of ownership. I wouldn't technically call them title.

THE COURT: Then what difference does it make?

MR. TREECE: Because the jury needs to hear someone familiar with this process.

THE COURT: Why?

MR. TREECE: To understand what the title situation that's revealed from these multiple sources. These sources come from all over the place.

THE COURT: Are there title documents? They may not be in the same --

MR. TREECE: There are documents probative of title. There are documents probative of the transfer, movement of the car from owner to owner.

THE COURT: Those are two different things. Let's start just with the documents of title. If there are documents of title and they are obviously documents of title, I don't see why they need explanation.

MR. TREECE: They are not documents as you just described them. They're not a document.

THE COURT: What do they look like? I need to see it to see what you're talking about.

MR. TREECE: Let Ms. Drooz explain what those are.

THE COURT: It would be much easier if you showed me what a document of title is.

MS. DROOZ: Your Honor, there's a distinction between -- if I may back up a little bit.

One of the issues in this case is one of truth or falsity. It's our burden as the plaintiff to prove that the car was not stolen as the advertisement said. Title and ownership are two separate issues. In Europe, cars aren't titled or registered in the same way they are here.

THE COURT: No, but you need to show that he was the owner.

MS. DROOZ: Yes, and we can do that.

THE COURT: What is the document that shows it?

MS. DROOZ: There are many documents.

THE COURT: Then you get more complicated.

MS. DROOZ: Mr. Hallingby --

THE COURT: Now you want me to get involved in foreign law, and, again, under the federal rules, foreign law is an issue for the Court, not for an expert.

MS. DROOZ: I'm not asking the Court to accept expert testimony on foreign law, but we are asking the Court to accept expert testimony on the way old, valuable cars are transferred, and that is relevant to the issue of falsity, your Honor.

THE COURT: You're telling me the documents don't show it?

MS. DROOZ: I'm saying they do.

THE COURT: If they do, let me see them and then I'll understand what you're talking about.

MS. DROOZ: They been submitted in discovery and if your Honor would like us to submit a short notebook of the documents, we're happy to.

THE COURT: It takes a whole notebook to change?

MS. DROOZ: About that much paper.

Of course, Mr. Hallingby has registered the vehicle. Before any of this happened, Mr. Hallingby bought the vehicle in 2000, he ultimately registered it. He has been the registered owner for eight years before the advertisement came out.

THE COURT: That's a different matter. For that you don't need an expert.

MS. DROOZ: Right. The dispute as to falsity that I understand is before the Court is whether Mr. Hallingby acquired a stolen car, and that takes some explanation.

MR. TREECE: And I think your Honor will find, I'm happy to submit whatever you'd like, given old foreign cars, and particularly Ferraris, that's not easy. We don't have an expert who is going to tell you what foreign law is, but it would be helpful to the jury to hear what they say about this. And I think it's a little premature. You're asking about discovery, and I'm just saying there's expert discovery. We have four, they have one or two people, parties.

THE COURT: I need to see the expert report to understand whether such testimony is admissible.

MR. TREECE: There have been expert reports and we're happy to submit them to the Court if you'd like. The parties are free to make motions in limine, Daubert motions to strike the experts, and that's really the way this conversation we're having now ought to be resolved. I was just giving the Court an informative point that the one other area of discovery that is not closed is expert discovery and the parties have been treating that as open.

THE COURT: Right. But I need to see what you're talking about because I don't understand. Are you talking about custom and practice in the industry?

MS. DROOZ: Custom and practice, your Honor, in the transfer of Ferraris.

THE COURT: What makes anybody an expert on that except that he testifies about it? That's not a lot of expertise.

MS. DROOZ: We have an expert who is a former member of the FBI and that was his specialty. He specialized in recovering stolen cars, your Honor, and he's done this a lot.

MR. MATTEO: Your Honor, I dispute that characterization.

THE COURT: He can testify that he's good at seeing what's stolen, but he can't tell the jury what's stolen.

MS. DROOZ: Right, but he certainly can aid the trier of fact in understanding what documents mean what.

THE COURT: When you have documents, you have to persuade me that you can't tell from looking at them what they mean.

MR. TREECE: Your Honor, but isn't the issue you're raising now issues that ought appropriately to be resolved pursuant to motion in limine, Daubert motion proceedings, after they're fully briefed, after we have an opportunity to show your Honor all this?

THE COURT: Except that this is a major problem. I think if you want to move forward, I should learn about it now.

MR. TREECE: What would you like us to submit to you so we can? We could submit the expert reports.

THE COURT: It doesn't help you to postpone the motion to disqualify the expert. I really need to know if this is an issue of expertise, which is a slightly different take.

MS. DROOZ: What we were thinking is to conduct the expert witnesses' depositions and either party is free to strike their testimony.

THE COURT: It's not only the parties. I have an obligation not to give the jury anything that I don't think will help them.

MS. DROOZ: Of course. Of course you do, your Honor, and I understand that. All I'm saying is if we want to move forward, to complete discovery so that we'd be ready for a summary judgment motion and we want to make one, too, I think both sides are going to want to have their experts testify so that they can rely on their testimony in the motion.

THE COURT: Do you have expert testimony?

MR. MATTEO: Your Honor, we have one expert.

THE COURT: On what?

MR. MATTEO: On the issue of what the advertisements mean to a member of the Ferrari community, which is the relevant community. And, your Honor, there is authority in the case law that that would be useful testimony to the Court.

THE COURT: I have to see those cases. When you say authority, I have great respect for my colleagues. But are you talking about Second Circuit rules?

MR. MATTEO: I believe there's a Southern District case, your Honor, but maybe Second Circuit.

THE COURT: I have great respect for my colleagues and, of course, I want to see what they said.

MR. MATTEO: Your Honor, we think this particular testimony would be useful. I just wanted to clarify one thing. At this point we don't plan on deposing plaintiff's four experts. We're comfortable proceeding at this point based on their reports alone.

MR. TREECE: So are we. So that solves it. There is no expert discovery. Discovery is over.

MR. MATTEO: But, your Honor, we may move to disqualify certain of the experts the plaintiff has designated.

THE COURT: That's in limine motions you're talking about.

MR. TREECE: I think that's fine. That solves the issue. No expert discovery, except for this punitive damage thing your Honor has resolved. Discovery is over. The parties can make motions in limine and we're off and running. That's what we want.

MR. MATTEO: If I can clarify, we do have some outstanding document requests.

THE COURT: I see.

MR. MATTEO: With respect to plaintiff's experts. Plaintiff has by and large agreed to produce those documents. We have a few small issues I'd like to raise with the Court. Other than that we have at this point no plan on taking any other expert discovery, and if I could be heard now on those issues.

THE COURT: Yes.

MR. MATTEO: We originally propounded our requests, plaintiff objected, refused to produce anything. Subsequently we sent a meet-and-confer letter. Plaintiff sent a letter back agreeing to produce everything, and then we had two more conversations on the phone to clarify any last-minute issues.

I sent a confirmatory e-mail to plaintiff's counsel reflecting my understanding of our conversation. I got a response back, and it's attached to the letter I submitted to the Court, where plaintiff's counsel said I agree with some of what you said, I disagree with other parts of what you said but then refused to tell me which parts. So I don't know if we have an agreement or not. I went back and forth a few times and asked plaintiff's counsel, based on the reasons I just gave the Court, to clarify and was told by plaintiff's counsel that she had no obligation to do so, which I suppose is correct, but it necessitates me to be here.

THE COURT: It doesn't assist forward movement.

MR. MATTEO: It doesn't, your Honor. So there are three small issues I'd like to raise, and I think they're easy. I would just like if plaintiff's counsel will verify this point, I would like the Court to order plaintiff's counsel to produce documents not only in the possession of Brownstein Hyatt, which is the law firm of counsel here today, but any other attorneys representing the plaintiff in this case. So, for instance, we asked for documents, communications between the attorneys and the designated experts.

Plaintiff has agreed to produce those on the grounds that it's facts and data considered by the expert. Plaintiff has agreed to produce those with respect to Brownstein Hyatt. When I asked to clarify whether or not that agreement also extended to, for instance, local counsel, Stroock, or any other counsel that we're unaware of in this case, plaintiff's counsel wouldn't answer my question.

MR. TREECE: Answer is yes, and there are none.

THE COURT: All right.

MR. MATTEO: Okay. That representation is fine with me.

THE COURT: All right.

MR. MATTEO: Secondly, we asked for documents concerning communications between plaintiff's experts and any third party about the opinions they've given or have considered giving in this case. There's authority in support of that proposition. When I asked, plaintiff's counsel responded, gave a number, there are a number of caveats and I couldn't determine based on the caveats given whether or not they were agreeing to produce all communications with third parties about the opinions given or considered given, and I would like the Court here to order plaintiff to produce those documents or for representation that they will.

MR. TREECE: If they're happy with about, we will do about. What I had said is all that were received or made after the expert's engagement that were assembled, solicited, considered, analyzed, relied on in forming or considering the opinions or that contain, express, or reflect opinions. If they don't like that and they're happy with about, we'll give them all that are about.

MR. MATTEO: Maybe I'm not smart enough to understand all those words. About the communications will be sufficient.

MR. TREECE: Good. We'll do it.

MR. MATTEO: Lastly, I would ask that you instruct plaintiff's counsel today ideally before this Court to inform me if there's any other aspects of my confirmatory e-mails with which they disagree.

MR. TREECE: Your Honor, this kind of goes to show no good deed goes unpunished. I came into this. Ms. Drooz was in Europe. We got their letter. I thought I'm just going to write him a letter and tell him we'll give him this stuff in clear language and so I did. And then I don't want to get into water under the bridge, but sometimes you get into these exchanges where one lawyer just wants you to say what you're doing in his words, not your words.

We're giving what I just said we'd give, and as to one of the other issues is notes of experts, of our designated experts, and what we said is to the extent they exist. Now, that's pretty broad. Notes can cover communications protected under the new rules, like communications with counsel that aren't subject to the exception. They could include partial draft reports with different text. What we said was and with each one of these, we said here's what we'll do and you don't need to give us any concessions. What we said we'll give them is all notes made by any of the identified experts after their engagement was commenced that were made by the expert in performance of the engagement which do not reflect protected communications with plaintiff's attorneys, are not drafts or partial drafts and don't reflect attorney's mental impressions, which are protected, so that's what we said we'll give.

I don't know what's ambiguous about that. I'm happy to try to clarify it.

MR. MATTEO: We have not raised that issue. We have no problem with that aspect. This isn't a dispute between the parties.

My issue is that Mr. Treece sent me the letter, said call Ms. Drooz to close the loop on these issues, so I talked to her, clarified some issues, put them in an e-mail and she told me I agree with aspects of your e-mail but I don't agree with others and wouldn't tell me what they were. I'm just asking if there are any other issues that plaintiff's counsel doesn't agree with in my e-mail to her. Otherwise, if they say no, I understand our agreement, I'm comfortable moving forward, but I think if they say there are, I think we're entitled to know them so we know what the scope of our agreement is.

MR. TREECE: Your Honor, their e-mail is irrelevant. I just said what we're going to give, and they said that's fine.

THE COURT: What was his reference to Ms. Drooz?

MR. TREECE: There's an e-mail exchange where they have Ms. Drooz and Mr. Matteo have a meet and confer and then he sends an e-mail trying to memorialize it, which was not quite right. And the first thing he set forth is what lawyers are you producing from. I have now told you, all the lawyers and the only ones are Brownstein. Communications of the experts with third parties, we've just resolved that by saying if it's about it, we'll give it. That's not an issue.

With respect to request No. 7, which involves transcripts, he says this is what I understand, and she says that's right. And she just said with a little edge on the voice of e-mail, maybe, look, we keep doing this and I'm tired of doing this, we're giving you what we're giving you, so I don't know why --

THE COURT: If you said we've given you everything you asked for, I think that would be the end of it.

MR. MATTEO: That's not what she said, your Honor. All I'm asking for is a representation that there are no other outstanding disagreements. If there are no other outstanding agreements, then I'm happy proceeding.

MR. TREECE: I've just told you there are none.

MR. MATTEO: Okay. That's all we wanted. We tried to get that before raising it with your Honor, and we weren't able to get it.

THE COURT: Very well.

MR. MATTEO: One other issue, your Honor.

In May, your Honor instructed all the parties to submit affidavits detailing their electronic search efforts.

THE COURT: Yes, how they searched.

MR. MATTEO: How they searched, yes, your Honor.

We submitted ours to plaintiff. Plaintiff refuses to submit one to us on the grounds they contend your Honor didn't order them to do so. We would ask that the Court order plaintiff to submit that affidavit.

MR. TREECE: I could resolve that easily. This morning, toothbrush still in my mouth, I got an e-mail from Mr. Matteo that said enclosed are three affidavits on this forensic issue. All I've got is a Blackberry. I can't read them. We will look at those. If they're compliant, we will give the affidavit we're supposed to give. If they're not, we'll try to work it out and come back to the Court. But we're happy to give the affidavit now that they've done what we think they were supposed to do.

MR. MATTEO: But, your Honor, I just want to be clear.

One, I'm not sure why their obligation depends on ours.

THE COURT: I understand.

MR. MATTEO: Secondly, I want to be clear what effort this affidavit will include because there's been some dispute as to that. In the letter I wrote to your Honor on the 26th, there's a footnote where I list the categories. Footnote two, our understanding of this Court's instruction, these are the categories that we followed in putting together our affidavits. We would ask that plaintiff follow these same categories that are in footnote No. 2 of our September 26 letter to your Honor.

MR. TREECE: Fine.

There are a couple other issues, one we kind of passed over. We kind of forgot about Mr. Calico because we got kind of sidetracked with Mr. Massini and the wonders of Swiss law. Mr. Calico, again, is in New York. He's a New York citizen. We want to depose him because we think he has had conversations with Mr. Massini about this case, about this car. This car is famous in the community, and we can't get at Massini and if he's had conversations with Massini, we'd like to know what they were and what Mr. Massini told him.

THE COURT: What can you do with it?

MR. TREECE: May lead to discoverable information, may help with whatever cross-examination of Massini we end up being entitled to. It could inform us submitting supplemental questions to be asked.

THE COURT: The first question is clearly whether he's had conversations with Massini.

MR. MATTEO: Your Honor, if I may, two points on this.

First, before your Honor, on May second, your Honor said fact discovery was closed with the exception of certain subjects.

THE COURT: That was true.

MR. MATTEO: And plaintiff didn't raise this issue at the time. Discovery proceeded. Two months after that, they noticed the deposition for Mr. Calico. We would submit that --

THE COURT: Untimely.

MR. MATTEO: -- the notice was untimely to begin with. We think that should decide the issue, but setting that point aside, we have told plaintiffs Mr. Calico had no involvement in the facts at issue in this case. We told them that repeatedly. They refuse to believe us. The information they come forward with in our letter all relates to supposed conversations of involvement well after these advertisements were published, has nothing to do with whether or not the advertisements were true or not, our decisions to publish them, or anything that was in the minds of anybody involved in this case at the relevant time period. It's all well after fact.

Your Honor pointed out correctly, I don't see how a conversation between Mr. Massini and Mr. Calico would even be admissible in this case or, frankly, all that relevant because the issue in this case is whether or not the car was stolen, whether or not my clients conducted adequate due diligence under whatever standard applies, and Mr. Calico has absolutely no knowledge of any of those subjects.

Discovery is essentially closed. We want to move forward, move on to summary judgment. We see no need at this point to delay proceedings any further, taking a deposition of a third party, who, I may add, has not been mentioned once in any deposition taken in this case. None of the documents in this case reflect any involvement of his at all here and he's not on our witness list. We don't plan to call him as a witness at this trial. Plaintiff said deposition may be important to show Mr. Calico's bias.

THE COURT: Who cares if he's biased?

MR. MATTEO: My question too, your Honor.

MR. TREECE: We don't. But he may have had conversations. The test isn't, as your Honor knows, for taking a deposition or a third-party deposition, that it has to be admissible evidence.

THE COURT: No, but it has to be likely to lead to admissible evidence. So far I haven't heard why it would be.

MR. TREECE: Conversations with Massini would be.

THE COURT: After the fact, after all of this happened.

MR. TREECE: Yes, because it could be conversations with Massini about things that were before or during the fact, and their questions submitted to the Swiss authorities for Mr. Massini's deposition indicate they want to talk to Mr. Massini about just those things. And so if, as we suspect, Calico has talked to Massini, what he would tell us about that would be a basis for supplemental questions to Mr. Massini for cross-examining Mr. Massini, if we ever get a deposition.

THE COURT: Let me understand what could have been said after the fact that affected the publication of the advertisement, which is the issue.

MR. TREECE: There could have been conversations. Massini is a guy who purports to be an expert in title to these old Ferraris and keeps track of them. He keeps it on a computer. He's got a log that's got them. There could have been conversations about what the status of that title was before the ad was published. Massini is the guy, the only guy.

THE COURT: It's just been represented that if they talked it was always after. Am I wrong?

MR. MATTEO: Your Honor, he had no involvement at all in the publication of the advertisement whatsoever.

MR. TREECE: We understand that the defendants, or at least one of them, talked to Massini and relied on Massini to verify what they saw to be the truth of the advertisement.

MR. MATTEO: Before the advertisement was published, that's correct, your Honor.

MR. TREECE: Before, before. And they've got these questions they want to talk to Massini because he's supposedly an expert about all this other stuff about the status of the car before and after, which is directly relevant to the falsity, which we have to show, was this car a stolen car in December 2008. So that's all either directly relevant or likely to lead to discoverable information. This car 007.

MS. DROOZ: 0799.

MR. TREECE: 0799, I'll get it by the time we go to trial. 0799 was supposedly, by some reports, stolen along with three other cars. We understand Calico owns two of those cars.

MR. MATTEO: Your Honor, if I may, that's actually incorrect. Mr. Calico owns none of the cars that were actually stolen.

MR. TREECE: I guess the correct thing, he owns cars that he got somehow through Massini.

MR. MATTEO: He owns antique Ferraris like thousands of other people.

MS. DROOZ: Mr. Calico, we have conducted investigations and we are aware that Mr. Calico has for years relied on Mr. Massini to buy rare cars for him.

THE COURT: That may be, but we're not going to try another car.

MS. DROOZ: No, I'm not saying that, your Honor. I'm saying that he and Mr. Massini appear at car shows together.

They're very close. Mr. Massini is his broker. They're together in the Ferrari world and, in fact, Mr. Calico owns two of the rare cars that are exactly the same model as this car. He has a tremendous interest in this car, and it's highly likely that he's spoken to Mr. Calico.

THE COURT: What is his interest in this car? He's interest in his own cars.

MS. DROOZ: Mr. Calico owns two of these same Ferrari Cabriolet GT 1957, '58. The status of this car affects the market for those cars.

THE COURT: Oh, please. Now we're getting very far afield.

MR. MATTEO: I would submit he has no interest in this car, and, in any event, we're not calling Mr. Calico as a witness at trial, so whether he's biased or has an interest in this litigation is irrelevant.

MR. TREECE: Your Honor, they haven't shown what they have to show to defeat a third-party subpoena, which is he has absolutely nothing to offer. He has things to offer as we've described that at least might lead to discoverable information.

On the timing issue, we didn't find out about him until the Glitchstein deposition, I think it was.

THE COURT: When was that taken?

MR. MATTEO: It was taken in March, your Honor.

THE COURT: That's a long time ago.

MR. MATTEO: Your Honor, there are publications that link Mr. Calico to Mr. Massini as the broker, and, by the way, Mr. Massini, it's his profession, he's a broker to quite a large number of people, not just Mr. Calico. There are publications, Ferrari magazines, as early as January of this year linking the two of them. So all the information that they're giving you today, your Honor, that supposedly shows he's likely to have information, first, I don't think it shows that. Secondly, they've known it for many, many months before the discovery cutoff in this case. I see no reason to reopen the record on this point now, especially when they haven't made any showing whatsoever.

THE COURT: I thought you were eager to move forward to trial.

MR. TREECE: We are, your Honor. It's one deposition. It's in New York. It's not going to take me time. We can do it in a couple of weeks. We think we're entitled to it. We don't think they've made the showing to quash a third-party subpoena.

THE COURT: You're talking about Calico.

MR. TREECE: Talking about Calico.

THE COURT: You moved in Calico's behalf?

MR. MATTEO: Yes, your Honor.

MR. TREECE: Yes.

THE COURT: How did we get to a subpoena after the close of discovery anyhow?

MR. MATTEO: That was one of the bases of our letter, your Honor, on May 27.

MR. TREECE: We didn't learn about it until late.

THE COURT: You learned about it in March.

MR. TREECE: That's true.

THE COURT: The whole point of setting a schedule --

MR. TREECE: No, I know. When I look back in the record, things were kind of up in the air. It was unclear, and so we did it. If your Honor thinks that's late, discovery was over, and you think because of timing we're not entitled to it, well --

THE COURT: I think if it were a critical matter, I would bend the timing. But if it's essentially an expedition hoping to find something, I'm not prepared to set aside the schedule.

MR. TREECE: I'd just ask for a little leniency, it's maybe a three-quarter-of-a-day deposition.

THE COURT: Three-quarter day? Sounds to me like an hour.

MR. TREECE: Could be just an hour. It ain't going to be very long. I'll tell you that. So with everything that's going on, set a limit, give us an hour, give us an hour and a half. It's right here in New York, but with everything that's gone on in the case, I guess I'd ask you to cut us some slack on the timeliness.

THE COURT: I may do it if the two of you agree on the scope, because I don't want it to go off into a million things that have not previously entered into this case.

MR. MATTEO: Your Honor, if I may, we don't think that there's a need for the deposition at all. We've represented that Mr. Calico had no involvement, in addition to the fact that it's untimely. Plaintiff still has been unable to show other than by speculation that Mr. Calico's looked at any information that's relevant to this case in any way whatsoever. He's a private individual. Setting aside the fact that he's a very busy man, he has no involvement in this case.

THE COURT: What is it that you think he might know something about?

MR. TREECE: I think he may have talked to Massini a lot about this, and Massini is a big deal and we can't get at him and he may be a source to learn.

THE COURT: You think Massini told him what you haven't been able to ask him about?

MR. TREECE: We don't know. But I'll just bet you.

THE COURT: You need something that shows it's likely. The fact that they know each other does not do it. You've persuaded me in this case that this is a very small circle.

MR. TREECE: The Ferrari community is a very small circle. We know Massini and he are in communication with each other.

THE COURT: I will permit you to serve an interrogatory on him and ask him if he had any conversations with Massini about this Ferrari before the publication of this piece.

MR. TREECE: Technically, I don't think we can serve an interrogatory on a third party.

THE COURT: I don't know why not. I authorize discovery by interrogatory all the time.

MR. TREECE: We could do deposition by written interrogatory, I guess.

THE COURT: It's just that one question because, otherwise, we're wasting time. If he did not speak to Massini about this car before that ad was published, there's nothing there.

MR. TREECE: He's also connected, I didn't finish my list. He's also connected with Barnes in this community.

THE COURT: Who is Barnes?

MR. TREECE: Barnes is the principal owner of Cavallino, the other defendant. There are likelihood of communications there. I mean this guy's in the thick of this community.

THE COURT: Then ask him whether he has had a conversation with either Barnes or Massini prior to the publication of this advertisement about this car.

MR. TREECE: Your Honor, it shouldn't be limited to before.

THE COURT: I think at this stage of the proceedings and after discovery is closed, it should be limited to that period. Why not?

MR. TREECE: Because we think conversations after that are equally likely.

THE COURT: It could not have entered into whether the defendant knew anything that prevented publication.

MR. TREECE: True, but we have to prove falsity.

THE COURT: Certainly his conversations with either Barnes or Massini are not evidence of falsity or truth.

MR. TREECE: Possibly could be.

THE COURT: How? You can't admit his conversations. They're not admissible.

MR. TREECE: No, but they could lead to something that is admissible.

THE COURT: To what? To what?

MR. TREECE: It could lead to somebody who knows about, from direct knowledge, information that's directly relevant to whether this car was stolen or not.

THE COURT: You're telling me your client doesn't know as many people in the Ferrari community?

MR. TREECE: He probably doesn't know as many, but he knows a lot, yes.

MR. MATTEO: Your Honor, this seems to be a giant fishing expedition. As to the issue of falsity, that centers in part at least on whether or not this car was stolen. I don't see, Mr. Calico has no information on that topic whatsoever, and any conversation he had with anybody wouldn't be relevant.

THE COURT: Certainly wouldn't be admissible.

MR. MATTEO: Exactly, your Honor. I think at this point there's no need for this discovery whatsoever.

THE COURT: But after the fact, I don't understand it. If they consulted him before they decided to publish the article, that's one thing. But talk is cheap. After it took place, what is the relevance?

MR. TREECE: After the publication?

THE COURT: What might be relevant?

MR. TREECE: It might be relevant because it might relate directly to the actual status of the car.

THE COURT: What do you mean the actual status?

MR. TREECE: Whether it was stolen.

THE COURT: How does he know?

MR. MATTEO: He doesn't, your Honor. He never owned this car.

MR. TREECE: He was the one who the defendants relied on to verify the truth of publishing a statement that the car was stolen. So they must think he knows something about it.

MR. MATTEO: Not Mr. Calico, your Honor.

THE COURT: Is that going to be proven at trial, that they consulted Calico in order to decide this?

MR. TREECE: No. Massini, and Calico has conversations with Massini that will tell us something about what Massini knows or might know that relates directly to the title of the car.

THE COURT: You can ask that in the Swiss court.

MR. TREECE: Excuse me?

THE COURT: You can ask that in the Swiss court. I'm sure the judge will ask him what he knows about it.

MR. MATTEO: Your Honor, in fact, they've submitted questions to your Honor. Your Honor's approved them on this question.

THE COURT: I've permitted those questions to Switzerland.

MR. TREECE: I don't want to belabor it with your Honor.

THE COURT: I think all things considered, it's both too late and too unlikely to lead to relevant evidence.

MR. TREECE: Can we send the one interrogatory you suggested, or no?

THE COURT: I think you have in those questions -- oh, it's not to Calico, it's to Massini.

MR. TREECE: Right.

THE COURT: Mr. Massini knows whether he talked to Mr. Calico. If you come to me and say Massini said he talked to Calico about the title to this car, you might persuade me to let you ask the question. But I haven't seen the answer to the question whether Massini talked to him. That's the first question.

MR. TREECE: Can we ask Calico that question in the interrogatory you suggested?

THE COURT: I think you should wait until you have an answer from Massini on that question which you have put to him.

MR. TREECE: So the Court's ruling is the motion to quash is granted, just so I'm clear?

THE COURT: Unless Massini says he had a conversation with Calico that has any bearing on the publication of this article. Yes. We reach a point where it's enough.

MR. TREECE: Can the Court tell us what its ruling is on the letters rogatory issue, so we've got that clear?

THE COURT: What is the letters rogatory issue?

MR. TREECE: The letters rogatory issue is we ask that the Court say that Weber and Massini cannot testify live at trial unless we're permitted within two to three weeks of trial to take their deposition in New York or someplace which allows for real depositions. I understood that's what the Court was saying. I just want to make that clear.

MR. MATTEO: That's not my understanding, your Honor.

THE COURT: I'm confused. I thought I said that if Calico was going to testify. But let me put it another way. If either Massini or --

Who is the other Swiss fellow?

MR. TREECE: Weber.

THE COURT: Or Weber are to appear as witnesses at trial, they will have to be made available before the trial to be deposed.

MR. TREECE: Thank you, your Honor.

MR. MATTEO: Just so we're clear though, your Honor hasn't issued a ruling as to whether or not the testimony that Mr. Massini or Mr. Weber give through the Swiss proceedings is or is not admissible, correct?

MR. TREECE: I think it's premature for that.

THE COURT: I don't know.

MR. MATTEO: In other words, those proceedings will go forward.

THE COURT: We're not going to duplicate. If those proceedings go forward and all the information is received, then you may not need depositions. But that's something else. That's down the road.

MR. TREECE: We need to see what comes out.

THE COURT: First you need to see what comes out of the letters rogatory, right.

MR. TREECE: Understood, your Honor.

THE COURT: But normally I do not require people to testify about what they were prevented from testifying about before trial.

MR. MATTEO: Understood, your Honor.

The last issue on our side is we would like to move for summary judgment. We have all the evidence we need at this point.

THE COURT: What are the undisputed facts?

MR. MATTEO: The undisputed facts, your Honor, are that both of our clients checked with other experts. We have one of them. Mr. Roush was one of the world's foremost experts on antique Ferraris, determined that this car was in fact stolen before publishing the advertisement, and, therefore, whether or not the standard is actual malice, gross negligence or negligence, and we think it's at least gross negligence, they've satisfied their burden, they're not liable for defamation because there is simply no fault.

Secondly, we don't think the ads themselves are false. On summary judgment, plaintiff has the burden of demonstrating --

THE COURT: What you're saying is that the plaintiff is unable to proffer evidence that shows that it's false.

MR. MATTEO: Exactly, your Honor, that they cannot meet their burden of showing by clear and convincing evidence that these advertisements were false or defamatory. We think that the evidence is undisputed on that point. We also think the evidence is undisputed that the plaintiff has no damages.

In addition, they have a defamation, slander of title claim, your Honor, and we think that that claim, the evidence is undisputed so that they cannot put on that claim for much the same reason. They have to show actual malice in a publication of the advertisement.

THE COURT: Let me understand. Don't you have to prove falsity for slander of title also?

MR. MATTEO: You do, your Honor, but the first element is actual malice. We submit that the evidence is undisputed that they cannot satisfy that standard.

In addition, the advertisement simply isn't false. So it doesn't falsely imply that plaintiff doesn't have valid title to the car because, in fact, it's true the car was stolen and plaintiff knew it was stolen.

Lastly, they have to show special damages and they simply cannot for a number of reasons. So we think there are multiple grounds.

THE COURT: You're going to show undisputed facts that establish that.

MR. MATTEO: Yes, your Honor.

THE COURT: Or you're going to show, in addition, that the plaintiff has not proffered --

MR. MATTEO: Precisely, your Honor.

THE COURT: -- undisputed facts that would show to the contrary.

MR. MATTEO: That they can meet their burden of proof of demonstrating the elements of their claim. Yes, your Honor.

THE COURT: I never prohibit any motion that the federal rules permit. The only reason I have a pretrial conference normally is because, as I said before, something may be premature.

Now, I take it that the plaintiff does not want me to stop everything for these Swiss proceedings.

MR. TREECE: Your Honor, as I'm listening to Mr. Matteo, I was tempted to quote one of my favorite lines from lawyer movies, which was Joe Pesci's response to the prosecutor's opening in that movie, but I won't.

THE COURT: My Cousin Vinny?

MR. TREECE: My Cousin Vinny, I won't. But we disagree with everything that he said, and we think it's all disputed and they won't get summary judgment.

THE COURT: Time will tell.

MR. TREECE: Time will tell, and we don't want to hold proceedings up, so we suggest that these be set. Not quite sure how you want to do it.

THE COURT: I'll explain to you. You've read my rules. When a motion, any motion, doesn't have to be summary judgment, is made, I require notice of motion with a return date. I hear motions on Thursday mornings, and I require that the response to the motion be on a day that's two weeks after the filing and service of the motion and that if there is any real reply that be served by the day before the return date. That's in my rules.

If you want to agree to spreading it out more, what will happen is the plaintiff cannot make its motion until you can comply with those arrangements and you may be able to work out a more spread schedule and have the defendant move, file its motion a little later. But once a motion is filed, you have to comply with my time schedule.

MR. TREECE: Understood. And we may have a motion for summary judgment on the truth defense and some other issues. I actually had read your Honor's rules. What I was asking was whether you want to set the date for the filing of these and then based on that we either work out a different schedule that spreads it out or comply with your rules. And do you want to do that today?

THE COURT: I don't usually choose the return date. But I do require that once a motion is filed and served, you comply with my rules.

MR. TREECE: Okay.

THE COURT: Sometimes parties are able to persuade each other, actually, fairly often, that each would like more time, and they can agree that the motion won't be filed until a certain date. I have nothing to do with that.

MR. TREECE: Understood, understood.

THE COURT: But if I set a date for trial and you want an early trial date, you should move expeditiously and you should agree on a schedule closely following my rules. I would think you'd want to get a definitive answer on the motions as promptly as possible.

MR. TREECE: Okay.

THE COURT: I hear oral argument on all motions, which is why I require a return date. I will hear oral argument on the date that is the return date on the notice of motion.

MR. TREECE: Your Honor, I have one more issue on my list. One of the things we asked for relates to the appropriate designee by the Roush defendants for a 30(b)(6) deposition. You may recall there were letters back and forth to your Honor about the appropriateness of the person that was designated as the 30(b)(6) deposition not having done the appropriate diligence to be able to answer. They do have an issue because Mr. Roush died, so finding somebody who they could educate presents a little difficulty, but we think the Court --

THE COURT: Right, what you're saying is that there is no live person who really has knowledge of the facts.

MR. TREECE: There probably, there may well not be. They would know better than I, and if that's the case, then under the rules, the burden falls to them to use due diligence to educate somebody to testify on the topics, and we don't have that person designated yet and we'd like to get that done so we can finish that process.

MR. MATTEO: Your Honor, a bit of background.

THE COURT: Why don't you tell me about what this history is.

MR. MATTEO: At the May 2 conference, your Honor instructed us to determine whether or not there was any additional information other than that which was known to our corporate designee at her deposition in January as to what steps Mr. Roush, who is now deceased, took to verify the contents of the advertisement before publishing them. A couple of days after that conference, plaintiff's counsel said no, that's not enough, we want a deposition on a number of categories and we'll tell you what those categories are.

A month passed, we didn't receive that list. I sent an e-mail to plaintiff's counsel saying what are your categories. By the way, we disagreed with whether or not we were obliged to give them all of these categories, but to resolve this in good faith, we agreed to consider these issues. That was in June, we sent an e-mail asking for those categories. Nothing happened and then plaintiff sends this letter to the Court saying we've been derelict in not giving them a deponent.

THE COURT: Providing a new name.

MR. MATTEO: Now they say they want a deposition on every category in the original deposition notice.

Your Honor, I would submit the time for this has long since passed. We twice reminded plaintiffs we wanted this information. We never got it. In any event, if your Honor is going to allow --

THE COURT: Is there anybody who has knowledge of the facts?

MR. MATTEO: That's my next point, your Honor. The issue that we were instructed to look into, which is what other information existed as to whether or not or what steps Mr. Roush took to verify the contents of the advertisement, we found no additional information. And that's what your Honor instructed us to do. That's what we did, and that's what we told the plaintiffs we did.

I just want to be clear that I'm not saying that every single piece of information known to Roush Publications is in that transcript. If plaintiff's counsel didn't ask an appropriate question or didn't ask about a certain document, it shouldn't fall on us. What I'm saying is that the information that was known at the time, the deposition occurred in January, there is no additional information that we've found on the issue of what steps Mr. Roush took to verify the contents of these advertisements before publishing them.

THE COURT: What steps did you take to find that out?

MR. MATTEO: The same steps, frankly, your Honor, that we took before the deposition, and we dispute there was any issue in the deposition as to adequacy of our representative. We talked to all the employees of Roush Publications who were there at the relevant time period. Obviously we could not speak to Mr. Roush because he is deceased, and we asked our client to look for any additional documents that they could find bearing on the issue. After taking all of those steps we determined that all the information that we had in our possession at the time of the deposition was the same information. We took those steps, your Honor, just to be clear, also, we took them before the deposition as well, so we did educate our witness.

I've asked plaintiff's counsel to tell us what questions that it claimed our witness couldn't answer. They refused. So there's a bit of confusion here. There are some questions they asked. They would say, What did your father do on such and such a date, what was he thinking on such and such a date. Obviously those questions cannot be answered because he's deceased. That may be part of the issue. I don't know. They refuse to tell us what the questions are that they claim weren't answered adequately. But our position is there's no additional information other than what was known at the time in January, at the time of the deposition, on this subject of what steps were taken to verify the contents of the advertisements.

In any event, your Honor, we think they waited four months after we last reminded them of any issue on this point. I think, again, it's time to move forward. This issue has passed.

MR. TREECE: Ms. Drooz would like to address that.

MS. DROOZ: I think that's a fair characterization of what happened, your Honor. The designee that was produced at deposition was Mr. Roush's daughter, who readily admitted that she wasn't in the office at the time that the events in question took place, that she didn't know the contents of her father's files, that she didn't know the contents of the computers. She almost, almost completely failed to recognize the documents that were put before her. She had not been educated. In fact, as she admitted, she wasn't even there. Since we don't have Mr. Roush to talk to and given that the rules require this --

THE COURT: But why didn't you respond to the request?

MS. DROOZ: Because what happened, first of all, there were conversations and discussions about the request and here in court, if you remember, your Honor, we narrowed the issues. We narrowed the issues as to which we needed a designee.

THE COURT: Anyhow, what do you mean by educated? Somebody to look through the files of the company to see if there are any records of what Mr. Roush said?

MS. DROOZ: Yes. Knew, more like knew. For example, Mr. Roush, like Mr. Massini, has long kept detailed records on very rare Ferraris, including this Ferrari.

THE COURT: You didn't ask for the production of his records?

MS. DROOZ: I did, and we didn't get them. We got a grossly inadequate production, and that's another whole issue.

THE COURT: That's what you're talking about when you're talking about educating somebody. They have nobody who can be Mr. Roush, obviously.

MS. DROOZ: That's right.

THE COURT: Have you produced all of his notes, records, on this ad?

MR. MATTEO: Yes, your Honor.

In fact, we submitted affidavits to the plaintiff this morning in which the client, Roush Publications, Ms. Teral, who is the current 30(b)(6) deponent, said she is unaware of any other documents in her possession they did not provide to us. My firm has produced all responsive documents to the plaintiff's discovery requests.

THE COURT: The only other thing that I can direct you to do is to file an affidavit showing what you examined, how you conducted the search.

MR. MATTEO: I'm willing to make that representation on the record now, your Honor, if that's sufficient for you.

THE COURT: It's not. They're entitled to a description of how the search was conducted and how the records were kept.

MS. DROOZ: Particularly, your Honor, the person is averring that there are no further documents is the same person who said that she didn't know whether there were further documents.

THE COURT: That's beside the point. First, you are entitled to a description of what the search was that was made and how the records are kept.

MS. DROOZ: Under 30(b)(6) though, your Honor, are we not entitled to have some exchange, some question and answer?

THE COURT: You can't revive a dead man.

MS. DROOZ: Right, but this is a corporation, Roush Publications.

THE COURT: You're entitled to know how the records were kept that he kept and how the search was conducted and what was found. That's what you're entitled to know.

MS. DROOZ: Right.

THE COURT: Beyond that, nobody can say. There is no other avenue.

MS. DROOZ: In that case, your Honor, could there be a list of what documents were searched and what was looked at?

THE COURT: You're just repeating in other words what I have just said --

MS. DROOZ: Very well, your Honor.

THE COURT: -- that an affidavit that's required is how his records were kept and how the search was made and what was found.

MR. MATTEO: Just to be clear, your Honor. Is your Honor's instruction that we list every single document that was found or, just as a general matter, describe the categories?

THE COURT: Didn't you turn over all the documents that were found?

MR. MATTEO: We did.

THE COURT: Then you can say every document that was found was turned over.

MR. MATTEO: Understood, your Honor. Thank you.

THE COURT: But it's important how the documents were kept and how the search was made. That's really what's important.

MR. MATTEO: Understood, your Honor.

MR. TREECE: Your Honor, I think that's all we have. We thank you for your rulings and for your time.

THE COURT: Very well. I think I would like to set a trial date and we will see.

MR. TREECE: So will we.

THE COURT: Especially since I have a number of criminal matters that always have absolute priority. And because there are going to be motions for summary judgment, this cannot be a firm date since I don't know what those motions are going to be, really. I don't normally postpone trial for summary judgment because at the end of the plaintiff's case I can decide whether summary judgment is appropriate, which is why, since this case is an old case, I would like to at least aim for a trial date.

What is the estimated length of this trial?

MR. TREECE: We think two weeks, your Honor.

THE COURT: I see because of my criminal docket that I cannot really put you on before March 12, which is a Monday, and my experience is that I like to start civil trials on Tuesdays because criminal trials from everybody have priority on Monday and the panel doesn't come up very readily on Monday morning. So I think it's safer to put it on for the 13th of March.

MR. TREECE: Am I being naive to say that's next year?

THE COURT: That's next year. I wish it weren't so. I would like to try you next week.

MR. TREECE: So would we. That's good.

THE COURT: But this is a very busy court, and you certainly have plenty of time to figure out your Swiss whatever between now and then, and miracle of miracles, you may even end up settling. But we will see. March 13, the first day of trial I will start at 9:30 in order to resolve any housekeeping matters, but after that, the trial will start at ten in the morning.

MR. TREECE: I'm sorry, your Honor. I missed it.

THE COURT: The first day I will start at 9:30, but after that I will start at ten. That is ample time to resolve summary judgment motions and to do the best we can with Switzerland. I'm setting aside two weeks, although it's my experience that lawyers usually overestimate the length of their trials.

Very well. Is there anything further?

MR. TREECE: Not from the plaintiff, your Honor. Thank you.

MR. MATTEO: Nor from the defendants, your Honor. Thank you very much.

THE COURT: Good luck to everybody.

(Proceedings adjourned)